(4)

Supreme Court, U.S.
FILED
JUL 1 - 2004
OFFICE OF THE CLERK

No. 03-1601

In The Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,

Petitioners,

v.

MARK J. ABRAMS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE LOCAL GOVERNMENTS AND RELATED ASSOCIATIONS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

[Amici Listed on Inside Cover]

DENNIS J. HERRERA
City Attorney
JOANNE M. HOEPER
Chief Trial Deputy
Counsel of Record
THERESA L. MUELLER
Energy and Telecommunications
Team Leader
WILLIAM K. SANDERS
Deputy City Attorney
City and County of San Francisco
OFFICE OF THE CITY ATTORNEY
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
(415) 554-6771

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

LEAGUE OF CALIFORNIA CITIES, LEAGUE OF OREGON CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, MONTANA ASSOCIATION OF COUNTIES, ASSOCIATION OF OREGON COUNTIES, STATES OF CALIFORNIA AND NEVADA CHAPTER OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS & ADVISORS, WASHINGTON CHAPTER OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS & ADVISORS, CITY OF LOS ANGELES, AND CITY AND COUNTY OF SAN FRANCISCO

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
STATEMENT OF THE CASE	3
I. STATUTORY FRAMEWORK	3
II. THE PROCEEDINGS BELOW	5
REASONS FOR GRANTING THE PETITION	6
I. THE NINTH CIRCUIT'S HOLDING THAT A WIRELESS CARRIER HAS A REMEDY UNDER SECTION 1983 FOR A VIOLATION OF THE TCA CONFLICTS WITH THE HOLDINGS FROM OTHER CIRCUIT COURTS	8
II. THE NINTH CIRCUIT'S DECISION DEPARTS FROM THIS COURT'S ESTABLISHED PRECEDENTS BECAUSE IT IGNORES NUMEROUS INDICIA THAT THE REMEDIAL SCHEME CONGRESS CREATED IN THE TCA IS COMPREHENSIVE AND INCOMPATIBLE WITH ENFORCEMENT UNDER SECTION 1983	13
III. LITIGATION UNDER SECTION 332(C)(7) IS PROLIFERATING AND THE THREAT OF DAMAGES AND ATTORNEY'S FEES IS IMPAIRING THE ABILITY OF LOCAL GOVERNMENTS TO ENFORCE THEIR LOCAL ZONING CODES	17
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) 4

Allen v. McCurry, 449 U.S. 90 (1980) 5

AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d 1322, (11th Cir. 2000), *vacated on reh'g en banc*, 260 F.3d 1320, *appeal dismissed following settlement*, 264 F.3d 1314 (2001) 11

AT&T Wireless Servs. of California LLC v. City of Carlsbad, 308 F. Supp. 2d 1148 (S.D. Cal. 2003) 19

Blessing v. Freestone, 520 U.S. 329 (1997) 9

Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490 (2d Cir. 1999) 12

City of Riverside v. Rivera, 477 U.S. 561 (1986) 5

DeYoung v. Patten, 898 F.2d 628 (8th Cir. 1990) 16

FCC v. Pottsville Broad. Co., 309 U.S. 134 (1940) 16

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) 10

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) 16

Jones v. United States, 526 U.S. 227 (1999) 16

Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) 9, 13

National Tower, LCC v. Plainville Zoning Board of Appeals, 297 F.3d 14 (1st Cir. 2002) 4, 12

New Par v. City of Saginaw, 301 F.3d 390 (6th Cir. 2002) 12

TABLE OF AUTHORITIES – Continued

Page

Nextel Partners Inc. v. Kingston Township, 286 F.3d 687 (3d Cir. 2002) 9, 10, 11

Preferred Sites, LLC v. Troup County, 296 F.3d 1210 (11th Cir. 2002) 12

Primeco Personal Communications, L.P. v. City of Mequon, 352 F.3d 1147 (7th Cir. 2003) 10, 15

Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942) 16

Sprint Spectrum L.P. v. Town of North Stonington, 12 F. Supp. 2d 247 (D. Conn. 1998) 14

Town of Amherst v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9 (1st Cir. 1999) 16

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 13

Virginia Metronet, Inc. v. Board of Supervisors, 984 F. Supp. 966 (E.D. Va. 1998) 14

VoiceStream Minneapolis, Inc. v. St. Croix County, 342 F.3d 818 (7th Cir. 2003) 4

STATUTES

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988 ..... *passim*

47 U.S.C. § 151 3

47 U.S.C. § 152 (note) 10

47 U.S.C. § 332(c)(7) ..... *passim*

47 U.S.C. § 332(c)(7)(A) 3, 15

TABLE OF AUTHORITIES – Continued

Page

47 U.S.C. § 332(c)(7)(B)(iii) 5

47 U.S.C. § 332(c)(7)(B)(v) 4

CONSTITUTION

U.S. Constitution, Art. VI, cl. 2 16

STATE STATUTES

Cal. Gov. Code §§ 818.4, 821.2 14

745 Ill. Comp. Stat. §§ 2-104, 2-206 14

Ohio Rev. Code § 2744.03 14

OTHER AUTHORITIES

H.R. Conf. Rep. No. 104-458, *reprinted* in 1996 U.S.C.C.A.N. 124 ..... 3, 4, 12, 13

Elena Gaona, *Carlsbad Settles Suit Over Cell-phone Tower*, San Diego Union-Tribune, May 7, 2004 19

Rachel Gordon, *$5 Billion City Budget Full of 'Sacrifices,'* San Francisco Chronicle, June 2, 2004 19

Barbara Henry, *Carlsbad, Calif., Spends $146,000 on Lawsuit Over AT&T Cell Phone Tower*, North County Times, September 20, 2003 19

Carol Lloyd, *Calling All Cell-Phone Antennas*, www.SFGate.Com (June 9, 2004) 18

Emily Motsay, *Operators Scoring in Court on Rejected Towers Apps*, RCR Wireless News, May 10, 2004 18

TABLE OF AUTHORITIES – Continued

Page

Ellen Simon, *Complaints Over Cell Phone Service Abound*, Associated Press, June 4, 2004 17

Sprint, Cingular, Unveil Upgrade Plans, TRDaily, June 22, 2004 18

Thinking of Switching Wireless Providers? Verizon Wireless has Nation's Most Reliable Network, PR Newswire, May 19, 2004 18

Todd Wallack, *New Entry in Wireless Race*, San Francisco Chronicle, September 19, 2002 18

Kenneth H. Young, Anderson's American Law of Zoning (4th ed. 1996) 14

STATEMENT OF INTEREST

Local Government Amici support the petition for a writ of certiorari filed by the City of Rancho Palos Verdes and the City Council of the City of Rancho Palos Verdes (hereinafter jointly referred to as the "City").[1]

The League of California Cities is an association of 478 of California's 479 cities united in promoting the general welfare of cities and their citizens. The California State Association of Counties is an association of all 58 California counties. Its primary purpose is to represent county government before the California legislature, administrative agencies, and the federal government. These entities also monitor appellate litigation and identify those cases that are significant to California cities and counties, including this one.

The League of Oregon Cities is an association of 238 of the state's 240 incorporated cities. Its mission is to strengthen and support livable communities in the state. The Association of Oregon Counties is a volunteer-membership organization that represents all 36 Oregon counties. Its mission is to strengthen county government's ability to serve people.

The Montana Association of Counties is an organization representing all 56 Montana counties. It is authorized by law to represent the boards of county commissioners for the furtherance of good government and the protection of county interests.

---

[1] In accordance with Rule 37.6, Local Government Amici state that no counsel for a party authored this brief in whole or in part, and no person or entity other than Local Government Amici, their counsel and members made a monetary contribution to the preparation or submission of the brief. This brief is filed with the consent of the parties, and letters of consent are being filed under Rule 37.2.

The States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors, and the Washington Chapter of the National Association of Telecommunications Officers and Advisors represent the telecommunications needs and interests of local governments in the states of California, Nevada, and Washington.

The City and County of San Francisco and the City of Los Angeles are charter cities in the State of California. Both cities are defendants in lawsuits challenging the denials of applications for permits to construct wireless facilities. In addition, both cities expect to continue to be inundated with applications for permits to construct wireless facilities.

Local Government Amici have a direct interest in this case. If the decision of the Ninth Circuit is allowed to stand, it would have a detrimental effect on the ability of local governments to rely on local zoning codes to regulate the use of private property to construct wireless facilities.

In 47 U.S.C. § 332(c)(7), Congress preserved local zoning authority over wireless facilities siting subject to certain limitations. Congress also authorized wireless telecommunications carriers to sue local governments in court to challenge denials of applications to construct wireless facilities. In the decision below, the Ninth Circuit Court of Appeals held that the remedial scheme Congress established in Section 332(c)(7) is not sufficiently comprehensive to preclude claims for damages under 42 U.S.C. § 1983 and for attorney's fees under 42 U.S.C. § 1988.

Wireless carriers continue to file applications for permits to construct wireless facilities in the communities represented by Local Government Amici. A decision to approve the construction of a wireless facility is irrevocable. Concerns that local governments would be required to pay wireless carriers damages and attorney's fees, for

what amounts to nothing more than an erroneous zoning decision, could prevent Local Government Amici from denying such applications even where there might be legitimate grounds for such denials. That was not what Congress intended when it preserved local zoning authority over wireless facility siting.

Local Government Amici urge the Court to grant the petition for writ of certiorari and to reverse the decision below.

STATEMENT OF THE CASE

I. STATUTORY FRAMEWORK

Congress amended the Communications Act of 1934, 47 U.S.C. § 151, *et seq.*, by enacting the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "TCA"). Congress enacted the TCA to "accelerate rapidly private sector deployment of advanced communications" by establishing "a pro-competitive, de-regulatory national policy framework." H.R. Conf. Rep. No. 104-458, at 113, *reprinted* in 1996 U.S.C.C.A.N. 124 (hereinafter "H.R. Conf. Rep."). At the same time, Congress expressly preserved state and local zoning authority over wireless telecommunications facilities siting, subject only to certain specified limitations. Section 704, Pub. L. No. 104-104, 110 Stat. at 151-52 (codified at 47 U.S.C. § 332(c)(7)).

Section 332(c)(7) is entitled "Preservation of local zoning authority" and provides that "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). The legislative history of the TCA leaves little doubt as to Congress's intent when it enacted

this section. Section 332(c)(7) "prevents [Federal Communications] Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth" in the TCA. H.R. Conf. Rep., at 208.

Thus, in the TCA, Congress allowed local governments to "retain the authority to regulate the siting of wireless telecommunications facilities" subject only to the "procedural and substantive limitations" specified in Section 332(c)(7). *VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 829 (7th Cir. 2003). In so doing, Congress struck "a delicate balance between the need for a uniform federal policy and the interests of state and local governments in continuing to regulate the siting of wireless communications facilities." *Id.*; see also *National Tower, LCC v. Plainville Zoning Board of Appeals*, 297 F.3d 14, 19 (1st Cir. 2002) (Section 332(c)(7) "is an exercise in cooperative federalism and represents a dramatic shift in the nature of telecommunications regulation").

In the TCA, Congress both defined the limits of local zoning authority and expressly created a remedy for wireless carriers claiming a violation of the limitations contained therein. Congress allowed any person "adversely affected" by a decision that is "inconsistent" with any of the requirements of Section 332(c)(7) to "commence an action in any court of competent jurisdiction." 47 U.S.C. § 332(c)(7)(B)(v).

In Section 1983, Congress provided for a right of action and established remedies for persons deprived of any "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Section 1983 "came into existence as § 1 of the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 162 (1970). One of Congress's key objectives for enacting the Ku Klux Klan Act was "to override the

corrupting influence of the Ku Klux Klan and its sympathizers on the governments and law enforcement agencies in the Southern States." *Allen v. McCurry*, 449 U.S. 90, 98 (1980).

Congress subsequently expanded the rights of plaintiffs challenging deprivations of their civil rights under Section 1983 by enacting the Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. § 1988). With respect to civil rights actions, Section 1988 changed the so-called "American Rule" that each party to a lawsuit must bear its own attorney's fees and authorized the courts to award attorney's fees to prevailing plaintiffs in such cases. *City of Riverside v. Rivera*, 477 U.S. 561, 567 (1986). Congress enacted Section 1988 "specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. . . . These victims ordinarily cannot afford to purchase legal services at the rates set by the private market." *Id.* at 576.

II. THE PROCEEDINGS BELOW

Respondent Mark Abrams filed a complaint under Section 332(c)(7) challenging the City's denial of his application for a conditional use permit to enable him to convert an existing wireless antenna on his property from amateur to commercial use. Pet. App. 16a-17a, 22a-23a. He sought monetary relief against the City under 42 U.S.C. § 1983 and recovery of his attorney's fees under 42 U.S.C. § 1988. Pet. App. 13a-15a, 17a.

The district court found that the City violated Section 332(c)(7)(B)(iii) because "substantial evidence" in the written record did not support the City's decision to deny Respondent's application for a conditional use permit. Pet. App. 16a-26a. The district court held that the City's

concerns about the antenna's visual impacts were insufficient grounds to deny Respondent's application for a conditional use permit because: (i) there were no further aesthetic impacts from Respondent's proposed commercial use of the existing antenna; and (ii) the decision was based entirely on generalized concerns about neighborhood aesthetics. Pet. App. 23a-24a. The court also held that the "actual reasons" for the denial, including a concern about a proliferation of antennas, were not sufficient grounds under the TCA. Pet. App. 24a.

The district court subsequently entered an order vacating the City's denial of Respondent's application for a conditional use permit and enjoined the City to grant Respondent a conditional use permit. Pet. App. 14a. The district court, however, rejected Respondent's claim for damages under Section 1983 and for attorney's fees under Section 1988. Pet. App. 15a. The district court held that the "remedies available" to Respondent "are subsumed under the TCA, and that damages are not available." Pet. App. 14a.

Respondent filed an appeal from the district court's determination that he did not have a remedy under Section 1983. In reversing the district court's decision, the Ninth Circuit held that the remedial scheme contained in the TCA is not sufficiently comprehensive to "close the door on § 1983 liability" because Section 332(c)(7) "contains no remedies at all." Pet. App. 7a-8a. The Ninth Circuit went on to find that the savings clause in the TCA "affirmed" Congress's intent to "refrain from foreclosing § 1983 remedies." Pet. App. 10a.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for a writ of certiorari. The Ninth Circuit's decision that wireless carriers asserting a claim under Section 332(c)(7) can also recover

damages and attorney's fees under the civil rights laws expressly conflicts with decisions from the Third and Seventh Circuits. The Ninth Circuit's decision impliedly conflicts with decisions from other circuits in which the courts have granted wireless carriers injunctive relief and required local governments to issue the required permits when wireless carriers have prevailed in cases alleging violations of Section 332(c)(7). The Ninth Circuit's decision departs from this Court's precedents by ignoring numerous indicia that Congress intended Section 332(c)(7) as a comprehensive remedial scheme that is incompatible with allowing wireless carriers to sue under Section 1983 and recover attorney's fees under Section 1988.

Review is necessary at this time because the Ninth Circuit's erroneous decision will have widespread, deleterious impacts on local governments in states within the Ninth Circuit. Section 332(c)(7) has been a fertile ground for litigation since the TCA was enacted in 1996. Dozens of district courts have decided cases raising claims under Section 332(c)(7), and many circuit courts have heard appeals from those decisions. Meanwhile, wireless carriers continue to build their networks. In many communities, including San Francisco and Los Angeles, local residents continue to oppose the proliferation of wireless facilities.

Until the Ninth Circuit's decision, local governments in Ninth Circuit states, and indeed in most states, believed that the appropriate remedy for a violation of Section 332(c)(7) was to order the issuance of the permit required to allow the wireless carrier to construct its facility. The courts consistently allowed for such a remedy when wireless carriers prevailed in Section 332(c)(7) cases. In most of those cases, the wireless carriers did not even allege a Section 1983 claim because Section 332(c)(7) provided sufficient relief. Now, wireless carriers filing new cases in circuits other than the Third and Seventh Circuits are more likely to include Section 1983 claims in their

complaints. The courts will continue to grapple with this issue until this Court resolves the matter.

In the meantime, local governments in Ninth Circuit states, and possibly other states, would be required to pay wireless carriers sizeable damages and attorney's fees simply because a court determined that substantial evidence did not support a denial of an application to construct a wireless facility. Under the Ninth Circuit's decision, even a failure to issue a decision that meets the "in writing" requirement of Section 332(c)(7) would be considered a violation of a wireless carrier's civil rights under Section 1983 and result in a substantial monetary award.

The Ninth Circuit's erroneous decision thus casts an enormous pall over local regulation of wireless facilities siting in the communities represented by Local Government Amici and in any community in the Ninth Circuit. If allowed to stand, the decision could have a substantial detrimental effect on local decision-making by preventing local governments from continuing to enforce local zoning laws when wireless carriers file applications to construct wireless facilities. Once the permits are issued and the facilities are constructed there is no going back. Even when local elected officials appear to have legitimate grounds to deny certain permit applications, communities might have to accept additional wireless facilities because those officials feared exposing strapped budgets to awards of substantial damages and attorney's fees.

I. THE NINTH CIRCUIT'S HOLDING THAT A WIRELESS CARRIER HAS A REMEDY UNDER SECTION 1983 FOR A VIOLATION OF THE TCA CONFLICTS WITH THE HOLDINGS FROM OTHER CIRCUIT COURTS.

The analytical framework for deciding whether a federal law provides an individual plaintiff with a right to

relief under Section 1983 is well settled. There are two exceptions to the general rule that a plaintiff may seek redress under Section 1983 for violation of a federal law. First, a remedy under Section 1983 is available only if the Court finds that a law "created rights, privileges and immunities within the meaning of Section 1983." *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981) (internal quotations omitted). Second, no Section 1983 relief is available if the Court finds that Congress expressly forbade "recourse to § 1983 in the statute itself" or impliedly did so by "creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Blessing v. Freestone*, 520 U.S. 329, 341 (1997).

While the courts have all relied on the same analytical framework to decide the question presented for review, a threefold conflict between the Ninth Circuit's decision and the Third and Seventh Circuits' decisions has developed. First, the Ninth Circuit held that even though Section 332(c)(7) "provides for a private right of action by allowing aggrieved plaintiffs the right to bring an action in any court of competent jurisdiction" the "statute grants no remedies beyond procedural rights." Pet. App. 6a. The court held that the "procedural provisions are insufficient for us to conclude that the TCA contains a comprehensive remedial scheme that closes the door on § 1983 liability." Pet. App. 6a.

Faced with that very same question, the Third Circuit reached the opposite conclusion. *Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687, 694-96 (3d Cir. 2002). The court held that the remedial scheme in the TCA is "comprehensive in the relevant sense: it provides private judicial remedies that incorporate both notable benefits and corresponding limitations." *Id.* at 694. According to that court, the notable benefits include a right to "speedy redress." *Id.* at 695. The Seventh Circuit similarly held

that, "[a]ided by the presumption" that Congress intended a successful plaintiff in an action claiming a violation of Section 332(c)(7) to be entitled to the "usual remedies," the TCA's enforcement scheme is "complete." *Primeco Personal Communications, L.P. v. City of Mequon*, 352 F.3d 1147, 1152-53 (7th Cir. 2003) (hereinafter *"Verizon Wireless"*) (citing *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66-76 (1992)).

Second, the Ninth Circuit held that the "TCA's provisions are compatible with § 1983's remedies." Pet. App. 9a. Focusing on the "procedural" nature of Section 332(c)(7), the court held that "Congress can limit the time in which a plaintiff can file for relief, and require an expeditious review in any court of competent jurisdiction, without inadvertently limiting the plaintiff's remedies at the same time." Pet. App. 9a.

In *Nextel*, the Third Circuit had previously found that a Section 1983 remedy is incompatible with the TCA for two reasons. First, a plaintiff "would be freed of the short 30-day limitations period." 286 F.3d at 695. Such an expeditious review could limit the amount of damages that could be awarded. *Id.* Second, and "[p]erhaps most important, attorney's fees would be available." *Id.* The court noted the incongruity of allowing plaintiffs to obtain attorney's fees awards in cases that generally pit large corporations against small cities. *Id.* The Seventh Circuit similarly found that Congress could not have intended the TCA to provide the "unusual remedy" of attorney's fees to large "telecommunications enterprises." *Verizon Wireless*, 352 F.3d at 1152-53.

Finally, the Ninth Circuit held that the savings provision contained in Section 601(c)(1) of the TCA [47 U.S.C. § 152 (note)] "demonstrates that Congress did not intend the TCA to alter the operation of any federal law unless the TCA expressly provided for such change.

Section 1983 clearly falls within the parameters of this general savings clause." Pet. App. 10a. In so doing, the Ninth Circuit wholly adopted the reasoning of the Eleventh Circuit in a decision that the Eleventh Circuit subsequently vacated. See *AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322, 1328 (11th Cir. 2000), *vacated on reh'g en banc*, 260 F.3d 1320, *appeal dismissed following settlement*, 264 F.3d 1314 (2001).

Again, the Third Circuit in *Nextel* reached the opposite result. 286 F.3d at 695-96. The court expressly disagreed with the Eleventh Circuit analysis that the Ninth Circuit subsequently adopted. *Id.* at 695. Instead, the court stated that its holding that the TCA did not create a right enforceable under Section 1983 "does not mean that the TCA in any way modified, impaired, or superceded [sic] § 1983." *Id.* at 696. Instead, it means only that the "TCA itself did not create a right that can be asserted under § 1983 in lieu of the TCA's own remedial scheme." *Id.*

There is an express conflict among the circuit courts that have decided the question presented for review. As noted in the petition, this conflict also reaches down to numerous cases decided in the district courts. Pet. 19-20. The Court should grant the petition to resolve this conflict.

The Court should also grant the petition to resolve the implicit conflict between the Ninth Circuit's decision and decisions from other circuit courts concerning the overarching question that is the foundation for the Ninth Circuit's decision: Whether a prevailing plaintiff in a Section 332(c)(7) action has any *remedies* against the defendant. Pet. App. 6a, 9a. Every other circuit court in which a wireless carrier prevailed on appeal in a Section 332(c)(7) claim has answered this question in the affirmative,

holding that, at a minimum, injunctive relief is available for a violation of Section 332(c)(7).

In *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490 (2d Cir. 1999), for example, the court upheld an appeal from the district court's determination that the defendant had violated Section 332(c)(7). *Id.* at 497. The town had argued on appeal that the district court improperly issued an injunction ordering the town to issue the necessary permits and that the court should have remanded the application back to the town "for compliance with remaining local procedure." *Id.*

The Second Circuit affirmed the district court's injunction. The court held that "injunctive relief best serves the TCA's stated goal of expediting resolution of this type of action." *Id.* See also *National Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 24-25 (1st Cir. 2002); *New Par v. City of Saginaw*, 301 F.3d 390, 399-401 (6th Cir. 2002); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1222 (11th Cir. 2002).

The holdings in these cases are consistent with the legislative history of the TCA in which Congress noted that the TCA "provides a mechanism for judicial relief from zoning decisions that fail to comply with" Section 332(c)(7). H.R. Conf. Rep., at 208. The Ninth Circuit's determination that wireless carriers do not have any remedies under Section 332(c)(7), on the other hand, is inconsistent with the legislative history of the TCA.

Unless this Court grants the petition and resolves these conflicts among the circuit courts, local governments in Ninth Circuit states will be forced to refrain from exercising their local zoning authority in order to avoid damages and attorney's fees awards that they can't afford to pay. Local governments in states in the Third and Seventh Circuits, however, can continue to consider applications to construct wireless facilities without such

fears. Meanwhile, local governments in states in the other circuits are left wondering whether their actions could be costly while cases considering this issue work their way through the courts.

II. THE NINTH CIRCUIT'S DECISION DEPARTS FROM THIS COURT'S ESTABLISHED PRECEDENTS BECAUSE IT IGNORES NUMEROUS INDICIA THAT THE REMEDIAL SCHEME CONGRESS CREATED IN THE TCA IS COMPREHENSIVE AND INCOMPATIBLE WITH ENFORCEMENT UNDER SECTION 1983.

In deciding whether a remedial scheme is sufficiently comprehensive and incompatible with Section 1983, a court should look to the statutory language, the legislative history, and "other traditional aids of statutory interpretation." *Sea Clammers*, 453 U.S. at 13. When Congress enacted Section 332(c)(7), it legislated against a historical backdrop that leads to the inescapable conclusion that Congress created a comprehensive legislative scheme that is incompatible with enforcement under Section 1983.

First and foremost, the Ninth Circuit's decision that wireless carriers have a remedy under Section 1983 for violation of Section 332(c)(7), and a concomitant right to attorney's fees under Section 1988, ignores the purposes of the TCA and the civil rights statutes.

For more than a century, private parties have challenged zoning ordinances and individual zoning decisions in court. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926) (noting that zoning laws began around the turn of the century). Thus, in Section 332(c)(7) Congress authorized the courts to hear *appeals* from zoning decisions by local governments. See H.R. Conf. Rep., at 209 (a party "appeals" a decision under Section 332(c)(7)).

A court could find that a local zoning authority violated Section 332(c)(7) simply because: (i) its decision to deny an application for a permit to construct a wireless facility was not "in writing;" or (ii) substantial evidence did not support its determination that the aesthetics of a particular wireless facility were incompatible with local zoning codes. See, e.g., *Virginia Metronet, Inc. v. Board of Supervisors*, 984 F. Supp. 966, 973 (E.D. Va. 1998) (to be "in writing" a decision must set out the reasons for the decision and the evidence that led to it); *Sprint Spectrum L.P. v. Town of North Stonington*, 12 F. Supp. 2d 247, 253 (D. Conn. 1998) (disagreeing with local government's determination that the proposed wireless facility would not be "in harmony" with the surrounding environment). These are not the types of abuses of local authority that Congress intended to vindicate when it enacted Sections 1983 and 1988. The Ninth Circuit's decision trivializes the importance of those laws.

Further, the remedies typically available to a person successfully challenging a zoning decision did not include damages and attorney's fees. Zoning decisions are subject to judicial review in all fifty states. Kenneth H. Young, Anderson's American Law of Zoning § 27.01 (4th ed. 1996). In some states review is had by way of appeal, while other states authorize either a proceeding in the nature of certiorari or an action for a writ of mandamus. *Id.* Indeed, in many states, local governments and local government officials are immune from liability for damages resulting from successful challenges to zoning decisions. See, e.g., Cal. Gov. Code §§ 818.4, 821.2; 745 Ill. Comp. Stat. §§ 2-104, 2-206; Ohio Rev. Code § 2744.03.

When it enacted the TCA, Congress certainly had to be aware of how the states have historically allowed for judicial review of local zoning decisions. Congress included a savings clause in the TCA so as not to impair such state laws. Rather than ensuring equal treatment for wireless

carriers when they file zoning applications for the construction of wireless facilities, as Congress intended, the Ninth Circuit's decision gives wireless carriers a decided advantage over other persons or entities seeking zoning approval for their projects.

Second, Section 332(c)(7) is a unique statute in that only a small number of persons or entities could become plaintiffs and seek remedies under the statute. To be a plaintiff in such a case, a person must have filed an application with a state or local government for a permit to construct a "personal wireless service" facility. See 47 U.S.C. § 332(c)(7)(A). Congress must have known that the plaintiffs in these cases would for the most part be multi-million dollar telecommunications corporations with ample resources to challenge any claimed violation of the law. As Judge Posner wrote: "The Telecommunications Act, in contrast to the federal civil rights statutes, creates rights in telecommunications enterprises, which are usually substantial corporations, such as Verizon. They have the wherewithal to finance their own litigation without the boost given by fee-shifting statutes." *Verizon Wireless*, 352 F.3d at 1152.

Moreover, only states and local governments could be defendants in actions brought under Section 332(c)(7). The Ninth Circuit's finding that Congress did not intend Section 332(c)(7) to preclude a claim under Section 1983 defeats the "delicate balance" Congress struck in Section 332(c)(7) between the competing interests of wireless carriers and state and local governments with respect to wireless facility siting. The decision tips the scales in favor of wireless carriers. The small cities and towns with stringent zoning requirements that often are defendants in these cases would not want to run the risk of being required to pay an award of damages and attorney's fees.

Third, Section 332(c)(7) is preemptive. See *Town of Amherst v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9, 16 (1st Cir. 1999) (Section 332(c)(7) preempts state and local laws "if they are read and applied so as effectively to preclude personal wireless service"). Such preemptive language is a strong indication that Congress intended the TCA's comprehensive scheme to be incompatible with a remedy under Section 1983. It is well settled that preemption of state and local law under the Supremacy Clause of the United States Constitution (Art. VI, cl. 2) "does not create rights enforceable under § 1983." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989). Instead, the Supremacy Clause "secures federal rights by according them priority whenever they come in conflict with state law." *Id.* (internal quotation marks omitted).

Finally, prior to the enactment of the TCA, it had been widely held that the Communications Act did not create any rights enforceable under Section 1983. See *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940) (the Communications Act "is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication"); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942) (the Communications Act "did not create new private rights"); *DeYoung v. Patten*, 898 F.2d 628, 634 (8th Cir. 1990) (no Section 1983 action is available under the Communications Act where there is a sufficient FCC enforcement remedy available). It has to be assumed that Congress is "unlikely to intend any radical departures from past practice without making a point of saying so." *Jones v. United States*, 526 U.S. 227, 234 (1999). Thus, consistent with established law, in providing for a judicial remedy under Section 332(c)(7) Congress demonstrated its intent to require wireless carriers to challenge wireless facilities siting decisions solely under Section 332(c)(7),

without seeking additional relief under Section 1983 and attorney's fees under Section 1988.

III. LITIGATION UNDER SECTION 332(C)(7) IS PROLIFERATING AND THE THREAT OF DAMAGES AND ATTORNEY'S FEES IS IMPAIRING THE ABILITY OF LOCAL GOVERNMENTS TO ENFORCE THEIR LOCAL ZONING CODES.

The issue in this case is a recurring one and the Ninth Circuit's decision threatens dire consequences for towns, cities and counties throughout the nation. In Section 332(c)(7), Congress expressly preserved local zoning authority over wireless facilities siting. The Ninth Circuit's determination that wireless carriers can sue local governments under Section 1983 for violation of the TCA, and recover attorney's fees under Section 1988, will impair the ability of local governments to enforce local zoning codes in a manner consistent with the requirements of Section 332(c)(7).

Despite a landscape dotted with wireless antennas, the need for new antennas appears to be unabated. Customers continue to demand better service.[2] Responding to those demands, wireless carriers continue to build out their networks to increase capacity, expand their coverage areas, and provide enhanced services.[3]

In the first quarter of 2004, Verizon Wireless invested over $1 billion to construct new wireless facilities, grow its

---

[2] Ellen Simon, *Complaints Over Cell Phone Service Abound*, Associated Press, June 4, 2004 (among the complaints are "frequently dropped calls").

[3] *Id.* (wireless companies "insist" that "they're investing in their networks").

capacity, and engineer other improvements.[4] Sprint Corp. and Cingular Wireless recently announced plans to further upgrade their networks.[5] New wireless carriers continue to enter the market.[6] These new carriers must construct numerous facilities in order to compete. Even in San Francisco, where wireless carriers have constructed more than 2,400 antennas, they continue to file applications for additional permits for new facilities.[7] Community opposition to those applications continues.[8] Indeed, on June 29, 2004, the San Francisco Board of Supervisors denied Cingular Wireless's application for a conditional use permit to construct a new wireless facility in the face of strong opposition from the community.

There also appears to be no let-up in the lawsuits that wireless carriers are filing against local governments when their applications for permits are denied. Emboldened by the Ninth Circuit's decision, wireless carriers may be even more willing to take cash-strapped cities to court to challenge zoning decisions that don't go their way. Sprint recently threatened to sue the city of Berkeley, California, if the city denied Sprint's application to construct a wireless antenna.[9] Sprint has also recently sued Stamford, Connecticut, and La Mesa, California.[10]

---

[4] *Thinking of Switching Wireless Providers? Verizon Wireless has Nation's Most Reliable Network*, PR Newswire, May 19, 2004.

[5] *Sprint, Cingular, Unveil Upgrade Plans*, TRDaily, June 22, 2004.

[6] Todd Wallack, *New Entry in Wireless Race*, San Francisco Chronicle, September 19, 2002.

[7] Carol Lloyd, *Calling All Cell-Phone Antennas*, www.SFGate.Com (June 9, 2004).

[8] *Id.*

[9] Emily Motsay, *Operators Scoring in Court on Rejected Towers Apps*, RCR Wireless News, May 10, 2004.

[10] *Id.*

On June 24, 2004, Verizon Wireless filed a lawsuit against San Francisco in the Northern District of California challenging a denial of an application for a conditional use permit to construct a wireless facility.[11] The City is already defending three other such suits.[12]

Many cities in California and other states must close huge budget deficits.[13] Fighting these claims could lead to ruinous damages and fee awards. For example, the City of Carlsbad, California, recently agreed to pay AT&T Wireless $250,000 in attorney's fees to settle a wireless siting dispute after AT&T Wireless had asked for $640,000.[14] The district court had previously ruled that Carlsbad's decision to deny AT&T Wireless a conditional use permit to construct a wireless facility was not based on substantial evidence. *AT&T Wireless Servs. of California LLC v. City of Carlsbad*, 308 F. Supp. 2d 1148 (S.D. Cal. 2003). Carlsbad has a population of about 90,000 and a budget of about $150 million.[15] In a city of that size a judgment of $640,000 could be devastating.

---

[11] *GTE Mobilnet of California, L.P. v. City and County of San Francisco*, C-04-2534 SI.

[12] *MetroPCS, Inc. v. City and County of San Francisco*, C-02-3442 PJH and C-03-0617 PJH; *Bay Area Cellular Tel. Co. v. City and County of San Francisco*, C-03-4866 PJH. These cases were also filed in the Northern District of California.

[13] Rachel Gordon, *$5 Billion City Budget Full of 'Sacrifices,'* San Francisco Chronicle, June 2, 2004.

[14] Elena Gaona, *Carlsbad Settles Suit Over Cell-phone Tower*, San Diego Union-Tribune, May 7, 2004. The city also expended a substantial amount of money just to defend the lawsuit. See Barbara Henry, *Carlsbad, Calif., Spends $146,000 on Lawsuit Over AT&T Cell Phone Tower*, North County Times, September 20, 2003.

[15] *See generally* http://ci.carlsbad.ca.us.

Rather than preserving local zoning authority, as Congress intended, the Ninth Circuit's decision will prevent local governments from enforcing zoning code requirements related to the construction of wireless facilities. Zoning decisions often entail a balancing of competing interests. Making decisions that are consistent with federal and local laws, while balancing those interests, is especially problematic for small cities and towns. They have neither the resources nor the expertise to defend against the lawsuits that are certain to be filed against them by wireless carriers, let alone to pay the damages and attorney's fees that wireless carriers would be entitled to if they prevailed. Faced with this substantial risk, it is reasonable to assume that local governments will simply opt to grant applications for permits to construct wireless facilities.

CONCLUSION

Local Government Amici urge the Court to grant the petition for a writ of certiorari.

Dated: July 1, 2004

Respectfully submitted,

DENNIS J. HERRERA
City Attorney
JOANNE M. HOEPER
Chief Trial Deputy
Counsel of Record
THERESA L. MUELLER
Energy and Telecommunications
Team Leader
WILLIAM K. SANDERS
Deputy City Attorney

Attorneys for Amici Curiae

APPENDIX 1

League of California Cities
Alisa Fong
Deputy General Counsel
League of California Cities
1400 K Street
Sacramento, CA 95814

League of Oregon Cities
Christy Monson
Legal Counsel
League of Oregon Cities
1201 Court St. NE, Suite 200
Salem, OR 97301-4194

California State Association of Counties
Jennifer Henning
Executive Director
County Counsels' Association of California
1110 K Street # 101
Sacramento, CA 95814

Montana Association of Counties
Gordon Morris
Executive Director
Montana Association of Counties
2715 Skyway Drive
Helena, MT 59602

Association of Oregon Counties
Paul Snider
Legal Counsel
Association of Oregon Counties
1201 Court St. NE
P.O. Box 12729
Salem, OR 97309

States of California and Nevada Chapter of the National Association of Telecommunications Officers & Advisors
Paul Valle-Riestra
President
City of Walnut Creek
1666 N. Main St.
P.O. Box 8039
Walnut Creek, CA 94596

State of Washington Chapter of the National Association of Telecommunications Officers & Advisors
Carol Mathewson
President
City of Tacoma
747 Market Street, Suite 209
Tacoma, WA 98402

City of Los Angeles
Rockard J. Delgadillo
City Attorney
Jeri L. Burge
Assistant City Attorney
City of Los Angeles
200 North Main Street, 7th Floor
Los Angeles, CA 90012

City and County of San Francisco
William K. Sanders
Deputy City Attorney
City and County of San Francisco
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682